85-226

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1984

WILLIE B. HACKETT,

Petitioner,

v.

HOUSING AUTHORITY OF THE CITY OF SAN ANTONIO, TEXAS A BODY POLITIC AND CORPORATE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

JURISDICTION 1

STATEMENT OF THE CASE 1

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI 4

1. The Judgment Of The Trial Court Was Supported By A Plentitude Of Admissible Evidence. 4

2. The Court Of Appeals Did Not Sanction Reliance Upon Inadmissible Evidence, But Rather, Found That Such Acceptance Of Inadmissible Evidence Was Not Reversible Error Because Other Admissible Evidence Supported The Trial Court's Judgment. 6

3. Petitioner Did Not Sustain His Burden Of Proof At The Trial Level As Outlined By *McDonnell Douglas Corp. v. Green.* 7

4. The Court Of Appeals Did Not Require Petitioner To Present Direct Evidence Of Discriminatory Intent, But Rather, Required Him To Directly Address The Issue Of Discrimination With Evidence. 10

CONCLUSION 11

TABLE OF AUTHORITIES

CASES: Page

1. *Hackett v. Housing Authority of the City of San Antonio*, 750 F.2d 1308 (5th Cir. 1985) ..... *passim*

2. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d (1973) 7, 10

3. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) 4, 7, 8, 9

4. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983) 4, 7, 10, 11

STATUTES:

1. See Petition for Writ of Certiorari to the Supreme Court of the United States on file herein, on Pages V. and 2-4.

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JURISDICTION

1. Respondent Does Not Contest Jurisdiction Of The Petition For Writ Of Certiorari.

—o—

STATEMENT OF THE CASE

From 1961 through 1970, Petitioner Willie B. Hackett purchased a number of army barrack style buildings in the Carson Homes area of San Antonio, Texas (R. Vol. 1, 28), a predominantly black neighborhood. In 1975, Petitioner began participation in the Section 8 housing program run

by the Housing Authority of the City of San Antonio (hereinafter referred to as "SAHA") (R. Vol. 1, 32), having converted these barracks into apartments ranging from one bedroom to five bedroom units. The Section 8 program allows a landlord to rent to otherwise impoverished persons with the difference between what the tenant can pay and the rental value of the unit being subsidized by SAHA. (*Hackett v. Housing Authority of the City of San Antonio,* 750 F.2d 1308 at 1310). A landlord voluntarily places property in the program, after which SAHA determines the rental value of the property and sets a rental maximum it will pay and a base rental the tenant must pay in accordance with the United States Housing Act of 1937, 42 U.S.C. §§ 1437-1437J and its regulations (*Hackett v. Housing Authority,* 750 F.2d at 1310).

In 1981, Petitioner perceived he was the subject of discriminatory action by SAHA regarding his property's rental value as set by SAHA which correspondingly caused the SAHA rental payments to him to decrease. (*Hackett v. Housing Authority,* 750 F.2d at 1310).

Petitioner alleged two types of discrimination by SAHA. First, that SAHA was allowing white landlords to receive more for their property than he was allowed, even though the units were close in proximity and size. Second, that the overall rental values placed on units in the Carson Homes area was discriminatorily low as compared to the rent of San Antonio. (*Hackett v. Housing Authority,* 750 F.2d at 1310).

On May 4, 1982, Petitioner filed suit against SAHA in the United States District Court for the Western District of Texas. The case was tried before the Court with-

out a jury. At the conclusion of that trial, the Trial Judge found no evidence of discriminatory action by SAHA, and entered a take nothing judgment. (R. Vol. 2, 97).

Part of the evidence presented by SAHA during the trial included an informal compilation of rental rates gathered by SAHA, mainly through talking with persons living or renting homes in the Carson Homes area. (R. Vol. 1, 6). This set of documents, identified as Defendant's Exhibit "Z" was objected to by Petitioner. (R. Vol. 1, 5-9).

While the trial court admitted the possibility of errors, it nonetheless admitted Exhibit "Z", stating the existence of errors or hearsay in the exhibit would go to its weight, and not admissibility. (R. Vol. 1, 5).

After hearing all the evidence, the Trial Judge stated, as to Exhibit "Z", that he relied upon it as revelant, particularly a SAHA interoffice memo which was contained as part of Exhibit "Z". (R. Vol. 2, 92). The judge then spent considerable time detailing rental rates gleaned solely from in-court testimony. (R. Vol. 2, 92-97). After comparing these rental rates and statistics, neither of which were objected to during trial by Petitioner, the trial judge determined that not only was there no showing of discrimination by SAHA, but if anything, Petitioner came out financially ahead in most areas. (R. Vol. 2, 95-97). A motion for new trial was denied, on December 23, 1983.

Petitioner thereafter appealed the District Court's ruling to the United States Court of Appeals, Fifth Circuit, arguing that the judgment was invalid because the court had "relied" upon inadmissible evidence. (*Hackett v. Housing Authority,* 750 F.2d at 1311).

The United States Court of Appeals, Fifth Circuit, ruled that Exhibit "Z" was inadmissible, and the District Court abused its discretion in receiving and considering it. (*Hackett v. Housing Authority*, 750 F.2d at 1312). However, the court ruled that the error was harmless in that even after Exhibit "Z" was removed from the case, there was still more than sufficient competent evidence to support the judgment. (*Hackett v. Housing Authority*, 750 F.2d at 1313).

Petitioner has raised two issues for review. First, Petitioner claims the abuse of discretion found by the Court of Appeals should not be allowed as harmless error, and that to so allow, contradicts the holdings of this court in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

Secondly, Petitioner contends that the Court of Appeals imposed an insurmountable burden of proof upon Petitioner by requiring him to provide direct evidence of discrimination by SAHA in contradiction to this court's holding in *Aikens*.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

1. The Decision By The Trial Court Was Supported By A Plentitude Of Admissible Evidence From Which That Judgment Should Be Upheld.

Petitioner gives great and exclusive weight to the statement by the trial judge that he relied upon Defendant's Exhibit "Z" when making his final decision. *Peti-*

tion for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, pp. 8-9 (hereinafter referred to as "Petitioner's Petition"). However, Petitioner fails to mention that the same trial court, while acknowledging the consideration of Exhibit "Z", further stated that it had relied *particularly* on a SAHA interoffice memorandum included therein. (R. Vol. 2, 92). This interoffice memorandum was tendered into evidence as Plaintiff's Exhibit 15 by Petitioner. (R. Vol. 1, 43-44).

The United States Court of Appeals, Fifth Circuit, determined that SAHA's Exhibit "Z" was in fact inadmissible evidence, and the receiving and consideration of same by the trial court constituted an abuse of discretion. *Hackett v. Housing Authority*, 750 F.2d at 1312. Respondent SAHA does not contest that determination here. Respondent asserts, however, that the Court of Appeals correctly stated that even without Exhibit "Z", Respondent overwhelmingly presented more than enough admissible evidence to rebut the prima facia case established by Petitioner. *Hackett v. Housing Authority*, 750 F.2d at 1313.

Respondent contests the implication by Petitioner that Exhibit "Z" was the *only* evidence considered by the trial court to sustain its ultimate ruling in favor of Respondent. In the Petition for Writ of Certiorari the trial court is portrayed as relying solely upon Exhibit "Z". The Circuit Court of Appeals, Fifth Circuit, found otherwise, and stated:

> "Erroneous receipt of evidence in bench trials undermines rather than destroys the judgment: In a nonjury case, the admission of incompetent evidence will not warrant reversal *unless all of the competent evidence is insufficient to support the judgment*, or un-

> less it affirmatively appears that the incompetent evidence induced the Court to make an essential finding which would otherwise not have been made."

Hackett v. Housing Authority, 750 F.2d at 1313 (emphasis added).

Utilizing the rule quoted above, the Court of Appeals in essence determined that there was competent evidence other than Exhibit "Z" to support the judgment.

2. The Court Of Appeals Did Not Sanction Reliance Upon Inadmissible Evidence, But Rather, Found That Such Acceptance Of Inadmissible Evidence Was Not Reversible Error In This Instance Because Of Other Admissible Evidence Produced By SAHA Upon Which The Ultimate Decision Could Be Sustained.

The Court of Appeals affirmatively found that the consideration of Exhibit "Z" by the trial court was an abuse of discretion. *Hackett v. Housing Authority,* 750 F.2d at 1312. The Court of Appeals did state, however, that ". . . exclusion of Exhibit "Z" would not have altered the District Court's finding that the SAHA did not discriminate against Hackett . . ." *Hackett v. Housing Authority,* 750 F.2d at 1313. The Court of Appeals reasoned:

> "In reviewing, fully-tried discrimination cases, we focus on determining the viability of the District Court's ultimate conclusion regarding the presence or absence of discrimination . . . Although Hackett demonstrated some basis for inferring discrimination, the SAHA overwhelmingly rebutted such an inference with evidence other than Exhibit "Z".

Upon review, the issue is not what evidence the trial court cited as reliable, but rather the entirety of evidence

presented and whether such evidence was sufficient to sustain judgment. Upon a thorough review of the entire record, the Court of Appeals determined sufficient evidence did exist.

3. Petitioner Did Not Sustain His Burden Of Proof At The Trial Level As Outlined By McDonnell Douglas Corp. v. Green.

The issues raised by Petitioner rest primarily upon the similarity between Title VII employment discrimination cases and the current Title VIII discrimination matter. *Petitioner's Petition,* p. 14. Specifically, Petitioner lays great weight on the holdings by this court in *United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 103 S.Ct. 1478, and *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089 (1981), both of which are Title VII cases.

In *Aikens,* this court held that once a Plaintiff in a discrimination suit establishes a prima facia showing of discrimination, the defendant can rebut that inference with admissible evidence only. *Aikens,* 103 S.Ct. at 1480. *Burdine* held that ". . . the defendant must clearly set forth, through the introduction of admissible evidence," the reasons for defendant's actions. *Burdine,* 101 S.Ct. at 1094.

Respondent agrees with Petitioner that the similarities between Title VII and Title VIII discrimination actions are such as to make distinctions between appropriate standards impracticable. However, Petitioner fails to realize that both *Aikens* and *Burdine* were determined by a burden of proof doctrine first enunciated by this court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93

S.Ct. 1817 (1973). This doctrine was explained by Mr. Justice Powell in *Burdine* where he wrote in relation to a Title VII case:

> ". . . the basic allocation of burdens and order of presentation of proof in a (discrimination) case is as follows: First, the Plaintiff has the burden of proving by a preponderance of the evidence a prima facia case of discrimination. Second, if the Plaintiff succeeds in proving the prima facia case, the burden shifts to the Defendant to articulate some legitimate nondiscriminatory reason for the employee's rejection . . . Third, should the Defendant carry this burden, the Plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the Defendant were not true reasons, but were a pretext for discrimination."

Burdine, 101 S.Ct. at 1091.

SAHA does not contest the finding by the Court of Appeals that Petitioner established a prima facia case. *Hackett v. Housing Authority*, 750 F.2d at 1313 (" . . . Hackett demonstrated some basis for inferring discrimination . . ").

Once the Court of Appeals determined that a prima facia case had been established, it then focused its attention on steps two and three of *McDonnell Douglas*, which shifted the burden of persuasion upon the Defendant to articulate its nondiscriminatory reasoning behind its action, and the final stage where a Plaintiff must show this reasoning is pretextual.

As Mr. Justice Powell stated in *Burdine*, once the prima facia case is established and the burden of explanation shifts unto the Defendant, " . . . It is sufficient if the

Defendant's evidence raises a genuine issue of fact as to whether it discriminated against the Plaintiff. To accomplish this, the Defendant must clearly set forth, through the introduction of admissible evidence, the reasons for . . ." the actions taken. *Burdine,* at 101 S.Ct. at 1094.

SAHA asserts, and the Court of Appeals found, that SAHA had produced sufficient admissible evidence to rebut the prima facia showing. *Hackett v. Housing Authority,* 750 F.2d at 1313 (" . . . the SAHA overwhelmingly rebutted such an inference with evidence . . ."). Preeminent among this evidence produced by SAHA during the trial was a SAHA interoffice memorandum, dated December 23, 1981 (introduced by Petitioner) indicating that he received more money for certain units than did a neighboring white landlord, and a set of computer print-outs which again showed that Petitioner received more average money for his units than did other landlords, white or black. *Hackett v. Housing Authority,* 750 F.2d at 1314. And again, the fact that this, and other evidence, was not affirmatively cited by the trial court as was Exhibit "Z" does not mean that this evidence did not exist or was not considered by the trial court in formulating its ruling.

When SAHA sufficiently rebutted the inference of discrimination, the burden was then placed back upon the Petitioner to carry through with proving his case. *Burdine,* 101 S.Ct. at 1095:

> "(The Plaintiff) must now have the opportunity to demonstrate that the proffered reason was not the true reason . . . (He) may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered ex-

planation is unworthy of credence. See *McDonnell Douglas*, 411 U.S. at 804-805, 93 S.Ct. at 1825-1826."

The Court of Appeals found, upon careful examination of the entire record, that Petitioner failed to carry out this third leg of the *McDonnell Douglas* test in that the Court of Appeals could cite no evidence presented by Petitioner aimed at showing the nondiscriminatory reasons proffered by SAHA were pretextual. When this final, and ultimate burden was not fulfilled, Petitioner's case failed. See *Aikens*, 103 S.Ct. at 1483 (" . . . the *McDonnell Douglas* framework requires that a Plaintiff (only) prevail when at the third stage of a Title VII trial he demonstrates that the legitimate, nondiscriminatory reason given by the employer is in fact not the true reason for the employment decision.") In essence, the Petitioner raised a rebuttal inference which, when rebutted, raised " . . . the factual inquiry . . . to a new level of specificity" (*Burdine*, 103 S.Ct. at 1095), a level to which Petitioner never climbed.

4. The Court Of Appeals Did Not Require Petitioner To Present Direct Evidence Of Discriminatory Intent, But Rather, Required Him To Directly Address The Issue Of Discrimination With Evidence.

The last claim upon which Petitioner seeks review is based upon his determination that when the Court of Appeals stated, "A thorough review of the record shows that Hackett produced no direct evidence of intentional discrimination . . .," that the court was requiring direct evidence of discriminatory intent contradictory to the holding of this court in *Aikens*.

Aikens holds that because of the difficulty inherent in trying to prove a person's mind and intent, a discrimination Plaintiff should not be required to present direct evidence of intent. *Aikens*, 103 S.Ct. at 1482-1483. But, the burden of proof remains on the Plaintiff to present evidence *directly related* to the central issue of discrimination.

SAHA asserts that when the Court of Appeals stated that Petitioner had not produced direct evidence of intentional discrimination, the court meant that he had not presented any evidence directly related to the issue of discrimination which went beyond the rebutted prima facia showing.

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CONCLUSION

Respondent presented more than enough unanswered, admissible evidence of nondiscriminatory, legitimate action in its dealings with Petitioner that was sufficient to sustain the ruling of the trial court, in spite of the inadmissibility of SAHA's Exhibit "Z". Further, Petitioner was not required by any court addressing this case to present direct evidence of discriminatory intent, but was only required to carry his ultimate burden of proof, which he did not do after Respondent rebutted the prima facia case.